No. 86-228

In The
Supreme Court of the United States
October Term, 1987

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER ON REARGUMENT

DONALD J. WILLIAMSON*
WILLIAMSON & REHILL
345 Kinderkamack Road
Westwood, New Jersey 07675
(201) 666-8001
Counsel for Petitioner

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED BY THIS COURT'S ORDER OF JUNE 26, 1987

1. Whether petitioner is subject to denaturalization for want of good moral character under 8 U.S.C. Sections 1451(a), 1427(a), and 1101(f)(6), with particular attention to

(a) whether the "false testimony" provision of 8 U.S.C. Section 1101(f)(6) should be interpreted to include a requirement that the false testimony concern a material fact;

(b) what standards should govern the determination under 8 U.S.C. Section 1101(f)(6) whether "false testimony" has been given "for the purpose of obtaining any benefits under this chapter . . ."; and

(c) whether the latter determination is one of law or fact?

2. (a) Should the materiality standard articulated in *Chaunt v. United States*, 364 U.S. 350 (1960), be abandoned and, if so, what standard should govern the materiality inquiry under 8 U.S.C. Section 1451(a); and

(b) is the determination of materiality under 8 U.S.C. Section 1451(a) one of law or fact?

3. When a misrepresentation has been established as "material" within the meaning of 8 U.S.C. Section 1451(a), must any further showing be made to establish that citizenship was "procured by" that misrepresentation?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

PRELIMINARY STATEMENT

The District Court found, and as was conceded by the petitioner, that he misrepresented his date of birth as October 4, 1913 (instead of September 21, 1915) and his place of birth as Kaunas (instead of Reistru) in his January 9, 1947 Application for Immigration Visa (Quota), and that he repeated the same misrepresentations in his October 23, 1953 Petition for Naturalization. (Pet.App.C, 118a-119a, J.A.30,48). At the time of his visa application, his correct age was 31 (instead of 33) and his actual place of birth was a rural town in Lithuania (instead of a city). He correctly disclosed in his visa application the name of the region or county of Taurage (in which the town of Reistru is located) where his parents resided. (J.A.30-31).

On March 4, 1948, petitioner received a non-preference, quota immigration visa, which had not expired at the time he applied for his Certificate of Arrival and Preliminary Form for a Declaration of Intention to become a citizen of the United States on May 29, 1948. (J.A.38-41). He neither sought nor obtained an age-related (unmarried child under 21 or dependant child under 18), marriage-related (spouse of U.S. Citizen), or job-related (skilled agriculturalist) preference. The sole basis for determining petitioner's eligibility for his quota immigration visa was his country of birth, which he correctly listed as Lithuania (J.A.30; 22 CFR § 61.250). Section 12(a) of the Immigration Act of 1924 provided in relevant part; "For purpose of this Act nationality shall be determined by country of birth . . .". *See also* 22 CFR § 61.250, n.104 (Petitioner's Reply Brief Appendix, 4a-6a). Petitioner was not a member of any of the classes of persons then excludable under

the immigration laws, which the regulations then promulgated thereunder specifically stated "are listed in the application". (22 CFR § 61.320 n.138, Petitioner's Reply Brief Appendix, 7a-8a).

The District Court found that petitioner could not have received any benefit "by placing his birth in Kaunas rather than Reistru and by dating his birth October 4, 1913 rather than September 21, 1915". (Pet.App.C, 118a-119a). The District Court further found that petitioner "continued to use his own name" and thus misstating his date and place of birth could not "insulate" him "from charges of war crimes" (Ibid). The District Court also found that, "There is nothing to suggest that his having been born on September 21, 1915 in Reistru would have had any effect whatsoever" on his receiving his visa since had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued." (Pet.App.C, 119a).

The Amended Complaint alleges that petitioner also misrepresented in his visa application and in his Alien Registration Form, his "true occupation during the period 1942-1944" (J.A.7,18). But, the petitioner's Application for Immigration Visa did not even ask for wartime occupations. The only space to be filled in as to occupation calls for a statement to be made in the present tense only, "That my calling or occupation is", to which the petitioner correctly answered "dental technician" (J.A.30). In part 9 of the Alien Registration form petitioner also correctly listed his "usual" and "present" occupation as dental technician (J.A.35). Part 10(a) inquired, "I intend to be engaged in the following activities in the United States", to which petitioner answered "unknown". In Part 10(b) the

form seeks further information about the alien's prior "activities" by inquiring, "I have been within the past 5 years, engaged in the following activities", with respect to which petitioner on January 9, 1947 correctly listed his activities in Germany as "student, dental technician, farmer and forestry work" (J.A.35). The only activity omitted from that form was his job as a clerk-bookkeeper in a brush and broom shop in Kaunas, Lithuania. Petitioner at that time submitted to Vice Counsel Frank K. Schilling his internal Lithuanian passport or identification card, dated March 26, 1944, which the Consulate's own translation shows disclosed "Occupation Office-worker" (J.A.28). The District Court found that even Seymour Finger (the former Vice Consul who testified as the Government's witness and whom the Government selected instead of Frank K. Schilling, the Vice Consul who actually processed petitioner's visa application) "would not have denied a visa even to a manager of a 15 employee brush and broom factory . . ." (Pet.App.C, 119a). The Third Circuit agreed with the District Court's finding that the alleged omission of petitioner's wartime occupation in Lithuania was not "material" (Pet.App.A, 35a).

The Amended Complaint also alleges that petitioner misrepresented his residence in Telsiai and concealed his wartime residence in Kedainiai during the period 1940-1942 (J.A.7,13,18). The District Court found that "both sides agree" petitioner "again entered Telsiai Seminary" in mid October 1941 (Pet.App.C, 111a). The record also contains, as a Government Exhibit, the Certification of the Seminary of Telsiai that petitioner was a student in Telsiai in 1941 (J.A.51-52). Whereas the visa application seeks a listing of all residences from the age of 14, Section 7(b) of the Immigration Act of 1924 required a listing of residences for

only 5 years preceding the visa application, or here back to January 1942, all of which were correctly listed as to petitioner. Neither the declaration of intention, nor the application for, nor petition for citizenship requests wartime residence (J.A.38-50). The District Court found that Seymour Finger, the Government's own witness, "testified that disclosure of a residence in Kedainiai in 1941 would not have raised any questions in his mind" and noted that petitioner's wife's visa "listed her birth place and residence in Kedainiai". (Pet.App.C, 119a). Petitioner also listed his wife's birth place as Kedainiaj in his visa application in the space immediately below the one in which was squeezed the list of seven residences he had from the age of 14 (J.A.30).

The District Court found that the omission of petitioner's residence in Kedainiai in the summer of 1941 was not material and that if disclosed would not have triggered an investigation and "would not have raised any question" even in Seymour Finger's mind as to whether petitioner had engaged in any atrocities (Pet.App.C, 119a). The Third Circuit agreed with the District Court on this issue and held, ". . . because there is no hard evidence in the record that the consulate officials in Stuttgart had knowledge of these particular atrocities at the time defendant applied for his visa, and the government accordingly did not prove that knowledge of the defendant's residence would have prompted an investigation, we cannot conclude that this concealment alone was material under the second prong of *Chaunt*" (Pet.App.A, 35a).

The Third Circuit also agreed with the District Court that (1) the government had failed to establish "that facts were suppressed which, if known, would have warranted denial of citizenship" (Pet.App.A, 20a); and (2) "that the

Chaunt materiality test is invoked when the government attempts to denaturalize a citizen based on the false testimony provisions of section 1101(f)(6)". (Pet.App.A, 27a).

The Third Circuit, however, then proceeded from the false premise that the absence of being a victim of Nazi persecution was a disqualifying fact that precluded petitioner from obtaining a valid visa to the false conclusion that such status somehow transformed his immaterial representations as to his date and place of birth into material misrepresentations under section 1451(a). In reaching that false conclusion of materiality, the Third Circuit ignored the District Court's explicit finding that Seymour Finger's testimony claiming that such a regulation then existed was "in error" (Pet.App.C, 120a n.7); and sidestepped the actual regulation in effect as to displaced persons covered by the Presidential Directive of December 22, 1945 (Pet. App.A, 33a n.10). The Third Circuit compounded its errors by making a *de novo* factual inference in favor of the Government that disclosure of petitioner's true date and place of birth would have triggered off an investigation that would have led to an examination of his having obtained a residence permit in pre-Allied Germany, from which a further inference was drawn that he was not a victim of Nazi persecution (Pet.App.A, 32a-33a). The Third Circuit's flawed review of the record failed to take into consideration the fact that petitioner had fully disclosed all of his residences in Germany, and that his visa application noted "Police dossier available", (J.A.30,33), neither of which served to trigger any investigation to determine if there were anly "discrepancies" as to his date and place of birth in the German municipal records.

As the District Court correctly found, the truthful disclosure of petitioner's date and place of birth would not

have resulted in an investigation and would have had no effect whatsoever on petitioner's eligibility for a visa or citizenship. None of those District Court findings was "clearly erroneous" or was declared "clearly erroneous" by the Third Circuit. Each of those findings by the District Court was "unassailable." *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. —, 106 S.Ct. 1527 (1986).

SUMMARY OF ARGUMENT

Section 1451 of the Immigration and Nationality Act ("INA") is the only provision of that Act governing denaturalization. Section 1451(a), the relevant part of that statute as to petitioner, requires that, before there can be denaturalization, naturalization must have been "procured by concealment of a material fact or by willful misrepresentation [of a material fact]." False swearing alone does not end the materiality inquiry when denaturalization is at stake. The materiality inquiry must be made under the denaturalization statute alone, since "In view of petitioner's status as a United States citizen, it is unnecessary to consider here the question of materiality at the naturalization stage." *Fedorenko v. United States*, 449 U.S. 490, 520 (1981).

The holding by this Court in *Chaunt v. United States*, 364 U.S. 350, 354-355 (1960), is that the denaturalization statute requires that, before a citizen can be denaturalized, there must be clear, unequivocal and convincing evidence which does not leave any doubt that "facts were suppressed which, if known, would have warranted denial of citizen-

ship." It is clear from the application of that holding by this Court that not every omitted or even intentionally suppressed fact would amount to a disqualifying fact warranting revocation of citizenship. This court should clarify or abandon the *dicta* in *Chaunt*, which sets forth two ambiguous formulations of an alternative approach to proving materiality, on the basis of the experience of this case where that "second prong" led an appellate court to engage in a tenuous line of reasoning to an hypothesised, but non-existent, visa eligibility requirement.

A materiality inquiry that would be satisfied by a diluted standard of proof of a mere "possibility" or "probability" would be in contradiction to the "firmly entrenched" denaturalization evidentiary standard, which requires clear, unequivocal and convincing evidence which does not leave any issue in doubt. That denaturalization evidentiary standard announced by this court in 1943, preceded and survived the revisions of Section 1451(a) in 1952 and is thus part of the substantive law of denaturalization.

The materiality inquiry rests on the substantive law of the denaturalization statute which governs which facts are critical to it and which are irrelevant. The legal element "procured by" in the denaturalization statute gives context to and limits the scope of the "material fact" requirement. Section 1451(a) is unambiguous in requiring that, before there can be denaturalization, naturalized citizenship must have been "procured by" the immigrant having concealed or misrepresented a "material fact." In the context of the denaturalization statute, "material fact" requires that, as a clear and unequivocal result of a fact being suppressed or misrepresented, citizenship, for which the immigrant was not otherwise eligible, was "procured." Thus,

a "material fact" has to be a fact which is controlling or outcome determinative, not merely "probably" or "possibly" of interest.

When the District Court "unassailably" found that had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet.App.C, 119a), it clearly meant that petitioner's citizenship could not have been "procured by" any of his misrepresentations or concealments.

ARGUMENT

I. PETITIONER IS NOT SUBJECT TO DENATURALIZATION FOR WANT OF GOOD MORAL CHARACTER

Section 1451 of the Immigration and Nationality Act ("INA") is the only provision of that Act governing proceedings to revoke naturalization. The relevant part of that statute requires that before there can be denaturalization, the naturalization must have been "procured by concealment of a material fact or by willful misrepresentation". 8 U.S.C. § 1451(a). Both the District Court (Pet. App.C, 123a) and the Third Circuit Court of Appeals in the instant case (Pet.App.A, 8a,25a-28a), as well as the Tenth Circuit Court of Appeals in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (C.A. 10, 1983), rejected the Government's attempt under Section 1101(f)(6) of INA to avoid the statutory requirement of materiality of a misrepresentation or factual concealment in a denaturalization proceeding. See also, *Maikovskis v. INS*, 773 F.2d 435, 440-

41 (C.A. 2, 1985), *cert. denied*, 106 S.Ct. 2913 (1986); and *In re Haniatakis*, 376 F.2d 728, 731 (C.A. 3, 1967). False swearing alone does not end this Court's "materiality inquiry" when denaturalization is at stake. *Fedorenko v. United States*, 449 U.S. 490, 507-508 (1981); See also, *Costello v. United States*, 365 U.S. 265, 271-272 n.3 (1961).

A. The Definition Of Want Of Good Moral Character Under 8 U.S.C. § 1101(f)(6), In Addition To False Testimony, Requires A Showing That It Was For The Purpose Of Obtaining An Immigration Benefit, Which Is The Functional Equivalent Of A Materiality Requirement.

Section 1101(f)(6) is part of the "Definitions" section of the INA. While the Definitions section does not define "materiality", its defined terms indicate that more than the giving of false testimony is required before there can be a finding of a lack of good moral character. Such false testimony must have been given "for the purpose of obtaining any benefits under this Chapter." Thus, not every false statement or false testimony *per se* constitutes lack of good moral character for purposes of the immigration laws. It is only that false testimony whose purpose is to obtain benefits under the immigration laws, unavailable to the applicant but for the false testimony, which precludes a finding of good moral character at the prenaturalization stage of citizenship. That additional "purpose" requirement is at least the functional equivalent of requiring that the false testimony concern a fact material to obtaining an immigration benefit.

The defined phrase "good moral character" appears substantively only in Section 1427(a), and it appears there

as one of the "Requirements of naturalization," as distinct from a ground for denaturalization. *Berenyi v. INS*, 385 U.S. 630, 636 (1967). *See also*, concurring opinion of Justice Blackmun in *Fedorenko v. United States*, 449 U.S. 490, 520 n.3 (1981). That section expressly provides that, "No person . . . shall be naturalized unless such petitioner . . . (3) during the period referred to in this subsection [the five years immediately preceding the date of filing of the petition for naturalization] has been and still is a person of good moral character . . . ". But, lack of good moral character is not one of the stated statutory grounds for denaturalization. Nor could it constitutionally be a ground for revoking citizenship once granted, for otherwise we would have two classes of citizenship, in which only naturalized citizens would be subject to loss of their citizenship based upon a finding of lack of good moral character for engaging in false swearing; whereas native born citizens would be subject only to fine and imprisonment. See *Klapprott v. United States*, 335 U.S. 601, 619 (1949).

B. In Order To Denaturalize There Must Be Clear, Unequivocal And Convincing Proof That Citizenship Was Procured By False Testimony With Respect To A Material Fact.

Petitioner's Application for an Immigration Visa (J.A. 32) indicated he would be subject to fine and imprisonment if he obtained entry into the United States "by a willful false or misleading representation or willful concealment of a material fact". There was no warning or any notice that subsequently obtained citizenship could be revoked on the basis of lack of good moral character for making any false statement. In Petitioner's Application to File Petition For Naturalization (J.A.42), he was put on notice

only that "Under the naturalization laws, citizenship may be revoked for concealment of a material fact or for willful misrepresentation in connection with the naturalization proceedings". No naturalized citizen has been forewarned that any false statement constitutes lack of good moral character for which his citizenship could be revoked.

When Congress enacted the Immigration and Nationality Act on June 27, 1952 it contained a Savings Clause, Section 405, which provided in pertinent part that,

> "(a) *Nothing* contained in this Act (this Chapter), unless otherwise specifically provided therein, *shall be construed to affect the validity of any* declaration of intention, petition for naturalization, certificate of naturalization . . . or *other document* or proceeding *which shall be valid at the time this Act shall take effect;* . . . but as to all such . . . proceedings, statute (so in original; probably should read "statuses") conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act (this chapter) are, unless otherwise specifically provided therein, hereby continued in force and effect. *When an immigrant, in possession of an unexpired immigrant visa issued prior to the effective date of this Act* (this chapter), *makes application for admission, his admissability shall be determined under the provisions of law in effect on the date of the issuance of such visa . . .*" 8 U.S.C. § 1101. (emphasis added). *See also United States v. Riela*, 337 F.2d 986, 989 (C.A. 3, 1964): "The legality of the defendant's naturalization must be determined under the applicable provisions of the statutes as they were at the time of his admission to citizenship".

Petitioner herein applied for a visa in January 1947 and received a non-preference, quota immigration visa on

March 4, 1948 that was valid under the Immigration Act of 1924 at the time of his lawful entry into the United States. Petitioner was not a member of any of the classes of persons listed as excludable on the visa application (J.A.31-32). Under Section 2(a) of the Immigration Act of 1924, it was required only that,

> "Such visa shall specify (1) the nationality of the immigrant; (2) whether he is a quota immigrant (as defined in section 5) . . .; (3) the date on which the validity of the immigration visa shall expire; and (4) such additional information *necessary* to the proper enforcement of the immigration laws and the naturalization laws as may be by regulations prescribed". Section 2(a), Immigration Act of 1924, Pub. L. No. 68-139, Ch. 190, 43 Stat. 153. (emphasis added).

Petitioner did not conceal or misrepresent any fact that was either "necessary" to the proper enforcement of the immigration laws or that had a "material" bearing on whether he would receive the "benefit" of a non-preference, quota immigration visa. Petitioner's visa was validly issued since his application correctly set forth his nationality as Lithuanian and correctly indicated he was a quota immigrant. The correctness of his age (31 instead of 33) was not "such additional information necessary to the proper enforcement of the immigration laws" since he did not seek or obtain an age-related preference. Incorrectly listing an urban location (Kaunas) as his place of birth in Lithuania instead of the rural area of Reistru, was additional information, but meaningless and hardly "necessary" to the proper enforcement of the immigration laws. Moreover, Section 7(b) of that Act required him to list places of residence only "for the five years immediately preceeding his application" (January 1942 to January

1947) and thus the listing of his residence in the summer of 1941 was not statutorily required for the valid issuance of a visa. Furthermore, Section 7(b) required him to list only his then "calling or occupation" which he correctly listed as dental technician. Thus, petitioner was "in possession of an unexpired immigrant visa", and he was not excludable under the Immigration Act of 1924 when he was admitted into the United States in 1948. He correctly disclosed such information as would have had a material bearing on whether to grant him a visa. Indeed, his misrepresentation of being born in a city tended to negate any skilled agricultural preference and his misrepresentation of being older eliminated any possible age related preference or "benefit."

As demonstrated *infra* at Points II and III, the standard which governs what false testimony can be the basis for denaturalization is that the Government must prove by clear, unequivocal and convincing evidence that citizenship was procured by misrepresenting or concealing the existence of a fact which would have ultimately disqualified the immigrant from citizenship.

C. "For The Purpose Of Obtaining Any Benefits" Is An Additional Legal Requirement Before Naturalization Can Be Precluded.

The making of a false statement under oath in immigration papers could have constituted a legal basis for being prosecuted for false swearing under 8 U.S.C. § 746 (prior to its repeal on June 27, 1952); and yet still not have constituted grounds for precluding naturalization under § 1427(a), let alone for now revoking citizenship under § 1451(a). Section 1427(a) of INA imposes the additional

legal requirement that the false testimony be given "for the purpose of obtaining any benefits under this Chapter". The clear implication is that the immigrant's purpose in lying must be to obtain an immigration benefit not otherwise available to him but for the lie.

At the time petitioner entered this country in 1948, the suppressed or misrepresented fact had to have been a ground for exclusion under the Immigration Act of 1924 in order to justify refusal of a visa or his exclusion upon entry. *United States ex rel. Teper v. Miller*, 87 F.Supp. 285 (S.D.N.Y. 1949). The leading case at that time was *United States ex rel. Iorio v. Day*, where the Second Circuit rejected the attempt to deport an alien, who had falsely sworn in his visa application that he had never been imprisoned, in stating, "It is true that the relator was bound to tell the truth on his application, but if what he suppressed was irrelevant to his admission, the mere suppression would not debar him". 34 F.2d 920, 921 (C.A.2, 1929).

After indicating, "I cannot understand what benefit defendant expected to achieve by placing his birth in Kaunas rather than Reistru and by dating his birth October 4, 1913 rather than September 21, 1915" (Pet.App.C, 118a-119a), the District Court herein made the express findings that "Ironically, it would appear that had defendant given the correct information in his visa application form, his visa nevertheless would have been issued. There is nothing to suggest his having been born on September 21, 1915 in Reistru would have had any effect whatsoever." *Id.* at 119a.

In any event, as pointed out by Justice Blackmun in *Fedorenko*, "In view of petitioner's status as a United

States citizen, it is unnecessary to consider here the question of materiality at the naturalization stage". 449 U.S. at 520 n.3. The proper inquiry as to materality must be made under the denaturalization statute alone.

II. THIS COURT SHOULD CLARIFY THAT THE HOLDING OF CHAUNT PRECLUDES A MERE POSSIBILITY OR PROBABILITY STANDARD

The holding in *Chaunt v. United States*, 364 U.S. 350, 354-355 (1960) is that, before a citizen can be denaturalized, there must be clear, unequivocal and convincing evidence, which does not leave any doubt, that "facts were suppressed which, if known, would have warranted denial of citizenship". It is clear from the application of that standard of materiality by this Court that not every omitted or even intentionally suppressed fact would amount to a disqualifying fact warranting revocation of citizenship. *Fedorenko v. United States*, 449 U.S. 490, 507-508 (1981). Thus, although Chaunt intentionally suppressed certain arrests for distributing handbills and engaging in public demonstrations by denying he had ever been arrested, he did disclose that he was a member of the International Workers Order, which was said to be controlled by the Communist Party. The disclosure of that affiliation was of much greater significance as to whether he had the requisite intent to renounce foreign allegiance at the time he took the oath of citizenship, than the thwarting of the "tenuous line of investigation that might have led from the arrests to the alleged communistic affiliations . . ." *Id.* at 355. There, this Court concluded that the failure to report the three arrests was "neutral" and that it would not "speculate" as to why they were not disclosed.

In the instant case, the petitioner accurately disclosed on his visa application each of his residences from January 1942 to January 1947, as was required by Section 7(b) of the Immigration Act of 1924. He also disclosed in his immigration papers that his wife was born in Kedainiai, his parents resided in Taurage, and that he had been a member of the Sauliai. None of those disclosures triggered off an investigation. Indeed, the Naturalization Examiner noted on the Petition for Naturalization "Investigation Waived." After a lengthy review of the record, the District Court expressly found that no investigation would have resulted had any of the suppressed facts been disclosed. (Pet.App.C, 118a-119a,136a).

Just as in *Chaunt*, this Court need not "speculate" as to why petitioner misrepresented his age as 33 instead of 31 years old and why he misrepresented that he was born in the city of Kaunas instead of the rural area of Reistru. Both of those facts were "neutral" with respect to what information was necessary to enforce the immigration laws. None of those facts could form a basis for even a "tenuous line of investigation," let alone lead to the actual existence of an ultimate disqualifying fact. Here, petitioner correctly disclosed those facts necessary to satisfy the statutory standards of eligibility for a visa and naturalized citizenship.

This Court is not bound by the *dicta* in *Chaunt* that suggested an alternative approach to proving materiality where the truth of the suppresed facts themselves would not warrant revocation of citizenship. When the alternative approach was initially suggested in *Chaunt*, Justice Douglas expressed it as, "Or disclosure of the true facts might

have led to the discovery of other facts which would justify denial of citizenship", *Id.*, at 353; but later in the same opinion Justice Douglas injected the words "useful" and "possibly" in expressing the alternative as "or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship." *Id.*, at 355.

This Court should, on the basis of the experience shown in this case, reject or abandon the *dicta* of Chaunt, which set forth two formulations of an apparent alternative approach to proving the materiality of facts suppressed or misrepresented in procuring citizenship. That so-called second prong of *Chaunt* has led some Circuit Courts to adopt "possibility" or "probability" standards of materiality, which here resulted in the anomaly of the Third Circuit finding an hypothesized, but non-existent, Nazi persecution visa requirement.[1] Such diluted standards can not logically be reconciled with the rigorous burden of proof by evidence that is clear, unequivocal and convincing (leaving no issue of fact or law in doubt) that this Court has consistently demanded in denaturalization cases at least as far back as *Schneiderman v. United States*, 320 U.S. 118, decided in 1943.

Even in *Chaunt*, this Court did not literally apply the "useful" and "possibly" language of Justice Douglas. It certainly would have been "useful" for the Immigration Service to have known that Chaunt had been arrested at

---

[1] At the oral argument on April 27, 1987, the Government conceded that there was no such statute or regulation: "We concede there's no statute or regulation". (TR Oral Argument 35).

least three times prior to becoming a citizen for engaging in public demonstrations in such a way that he was at least accused of violating city ordinances and park regulations. It is "possible", and arguably "probable", that those demonstrations and handbills might have reflected Chaunt's Communist affiliation as a district organizer of the Communist Party in Connecticut, although it is far from "certain" that such political activity showed a lack of intent to renounce foreign allegiance. At the very least, disclosure, instead of denial, of the arrests had the capability of leading to a Communist affiliation, from which an inference of continuing foreign allegiance could have been drawn. But this Court in *Chaunt* refused to engage in that form of speculation where the Government failed to prove the ultimate disqualifying fact of continuing foreign allegiance by "clear, unequivocal and convincing evidence". *Id.* at 355. Thus, it is not what this Court decided in *Chaunt* that has engendered a legacy of ambiguity and confusion among the Circuit Courts, but what Justice Douglas said in his *dicta*.

As pointed out by former Chief Judge Aldisert in his dissent when the Third Circuit grappled with the second prong of *Chaunt* in *United States v. Kowalchuk*,

> "The issue comes down to this: If this court, or any court, including the Supreme Court, adopts the literal meaning of one word "might", as contained in *Chaunt*, then one word will wipe out an entire galaxy of settled case law". 773 F.2d 488, 515 (C.A. 3, 1985).

During the first oral argument in the instant case, the Government took the position that the mere "possibility" standard of the second prong of *Chaunt* as construed literally could be satisfied on the basis of "reasonable sus-

picion" (TR of Oral Argument 37-38). That interpretation of "materiality" would not only wipe out a galaxy of case law on denaturalization, but would create an evidentiary standard heretofore unknown in any aspect of our jurisprudence, albeit the norm found in totalitarian societies.

The Government's proposed "reasonable suspicion" test is in extreme contrast to, and a radical departure from, the Justice Department position presented by then Deputy Attorney General Byron R. White to the Chairman of the Committee on the Judiciary on June 21, 1961 when he stated,

> The rationale of these cases is that because United States citizenship is such a precious right, no person should be deprived of it under the ordinary evidentiary rules prevailing in civil actions and that the Government must establish its case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt. Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals, or other undesirables. *The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act.* In these circumstances, the Department does not feel that sufficient reasons exist for change. (Appendix to Petitioner's Reply Brief, p.2a). (Emphasis added).

To change that "firmly entrenched" denaturalization evidentiary rule by diluting it to a mere "probability" or preponderence test, or worse yet, to an equivocal mere "possibility" or "suspicion" test (not found anywhere else in our jurisprudence), would be to deprive all naturalized citizens of a substantive right. To require proof of a mere "possibility" or "probabality" by clear, unequivocal and convincing evidence which does not leave any issue in doubt is a contradiction in terms and is irreconcilable with the express statutory language "procured by."

A. Clear, Unequivocal And Convincing Proof Of The Actual Existence Of An Ultimate Disqualifying Fact Should Be The Standard Governing The Materiality Inquiry Under 8 U.S.C. § 1451(a).

The "materiality inquiry" rests on the substantive law of the denaturalization statute which governs which facts are critical to it and which are irrelevant. *Anderson v. Liberty Lobby, Inc.*, 475 U.S. —, 91 L.Ed.2d 202, — (1986). It is submitted that materiality, in the context of the denaturalization statute, should mean that the truth of the suppressed or misrepresented fact would have disqualified the applicant from having "procured" citizenship; or that its truthful disclosure would have led clearly and unequivocally to the actual existence of a disqualifying fact, which but for its suppression would have prevented citizenship from having been so "procured".

The record below in this case contains a stark illustration as to why the denaturalization statute must be construed to require the Government to prove by clear, unequivocal and convincing evidence the actual existence of

an ultimate disqualifying fact, and one where inferences are drawn not tenuously in favor of the Government, but as far as is reasonable in favor of the citizen. *Schneiderman v. United States*, 320 U.S. 118, 122 (1943). On July 16, 1982 the Government amended its Complaint to allege that the petitioner falsely swore that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania and that such representation demonstrated a lack of good moral character under 8 U.S.C. § 1101(f)(6) and constituted a "material fact" under § 1451 (a) (J.A.7-9,14,17-18). The Government did so on the basis of the Soviet deposition on April 20, 1982 of petitioner's sister-in-law, Juze Rudzeviciene, in which she stated that, although she was married in a civil ceremony in Kaunas on August 23, 1943, she did not know anything about her sister Sofia being married in Lithuania at about the same time in 1943 and thought she was married in Germany in "1949" before she came to the United States[2] (X1088,1096-1097).

Prior to amending the Complaint and supporting it with a statutorily required affidavit of "good cause" (J.A. 22-24), the Office of Special Investigations ("O.S.I.") did not even inquire of the Soviet Government as to whether the Register of the Marriage Bureau of Kaunas recorded the petitioner's marriage on August 24, 1943. Less than one month after the Government amended the Complaint, but nine days after the initially scheduled trial date of August 2, 1982, the Lithuanian Ministry of Justice pro-

---

[2] Petitioner and his wife had already left Germany in 1948 and arrived in the United States on April 29, 1948, as the Government knew from its INA files, which it used at her deposition. (J.A.40).

duced a certified copy of Marriage Certificate No. 783 issued by the Marriage Bureau in Kaunas, Lithuania on August 24, 1943 to petitioner and his wife Sofia Anuskeviciute Kungys. The O.S.I. did not disclose that evidence to petitioner until October 7, 1982 when it attached it to its supplemental response to Interrogatory No.2.[3]

The stamp of the Kaunas Marriage Bureau on Sofia Kungys' Lithuanian Provisional Identity Card, which was part of her immigration file, contains the same number 783 as the Register of the Kaunas Marriage Bureau and states "On August 24, 1943 married to Mr. Kungys, Juozas". (X172,174, 176).

Had this case proceeded to trial without the Lithuanian certification, the Government would have argued that (1) under the mere "possibility" test there was a "reasonable suspicion" that petitioner lied about his marriage; (2) under the "probability" test, it is probable that his sister-in-law would have known if her sister had been married on the very next day in Kaunas and her lack of such knowledge would support an inference in favor of the Government that petitioner had lied about the fact of his marriage; (3) that lying about his marriage in his immigration papers proved petitioner lacked good moral character; and (4) lying about his marriage concealed a fact as to petitioner's "identity" and was thus "material".

---

[3] On January 31, 1983, the District Court, ordered, *inter alia*, that "Paragraph 13f, 17c, 19e, 22c, 39 at line 3 ('and true information concerning marital status'), 54 at lines 4-5 ('that he was married to Sofia Kungys nee Anuskeviciute'), 55 at lines 6-7 ('and that he was married to Sofia Kungys nee Anuskeviciute on August 24, 1943 in Kaunas, Lithuania') and 56 at lines 2-4 are hereby stricken, with prejudice from the Complaint, as amended." (Docket entry 112, J.A.1).

Neither the petitioner nor his wife sought or obtained a marriage-related preference and thus, in any event, any representation as to the fact of their marriage was not for the "purpose" of obtaining a "benefit" under the immigration laws. Moreover, even if they had not in fact been married in Kaunas, being unmarried would not have constituted a disqualifying fact under the immigration laws. Clear, unequivocal and convincing evidence was available to the Government as to whether petitioner was in fact married in a civil ceremony in Kaunas. Yet the O.S.I. amended its complaint with an accompanying affidavit of good cause, which defamed petitioner and his wife without even making the basic inquiry to the Soviet Government as to whether the Register of the Kaunas Marriage Bureau recorded the marriage of petitioner on August 24, 1943. That experience clearly shows that the "possibility" and "probability" standards of proving "materiality" promote prosecutorial short cuts and pose a real threat to just results, especially with respect to this decade's wave of denaturalization cases that are so heavily dependent on Soviet evidence, to which the naturalized citizen has scant access.

B. The District Court's Determination Of The Materiality Inquiry Under 8 U.S.C. § 1451(a) Is A Finding Of Fact Subject To Review Only Under The Clearly Erroneous Standard Of Rule 52(a) Of The Federal Rules Of Civil Procedure.

The substantive law of denaturalization consists of (1) the statutory legal elements of section 1451(a) that naturalization must have been "procured by" a "concealment" or "misrepresentation" of a "material fact"; and (2) the

firmly entrenched denaturalization evidentiary standard embodied in the case law that each of such legal elements must have been proved by evidence that is clear, unequivocal, and convincing which leaves no doubt as to any issue, and where, to the extent reasonable, every inference is drawn in favor of the citizen. The materiality inquiry rests on that substantive law which governs which facts are critical and which are irrelevant. Materiality is thus a criterion for categorizing facts in relation to the legal elements of the denaturalization substantive law. Since the denaturalization law requires that it be proved that citizenship was in fact "procured by" the misrepresentation or concealment of a "material fact," such a fact must be one which is outcome determinative.

When the District Court made the finding of fact that had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet.App.C, 119a), that finding determined that petitioner's citizenship was not "procured by" any of his concealments or misrepresentations. When the Third Circuit agreed with the District Court that none of the facts that "were suppressed, if known, would have warranted denial of citizenship" (Pet.App.A, 20a), it showed that the District Court's finding of fact was "unassailable." *Icicle Seafoods, Inc. v. Worthington, supra.*

When the District Court made the findings of fact that truthful disclosures of what petitioner concealed would not have resulted in an investigation (Pet.App.C, 135a-136a), and would not have had any effect whatsoever on his eligibility for a visa or citizenship, those findings of fact should have been dispositive, even under the alternative approach to materiality suggested by the *dicta* in *Chaunt*, unless

clearly erroneous. Yet, here, the Third Circuit ignored Rule 52(a) and ignored the directive of this Court in *Icicle Seafoods* (decided two months prior) by making its own finding of fact that an investigation would have been conducted. In doing so, the Third Circuit did not determine and could not, on the basis of this record, have determined that the District Court's finding of fact was "clearly erroneous". See Point III, *infra* at pp. 33-42.

The Third Circuit's flawed review was compounded by its characterization of its speculative reasoning process under the second prong of *Chaunt* as a "probability" standard. (Pet.App.A, 22a). Based upon its *de novo* finding of fact that an investigation would have been conducted, the Third Circuit drew the illogical inference that the truthful disclosure of a correct date and place of birth would have led to an investigation of residency records in Germany. (Pet.App.A, 32a-33a). In doing so, the Third Circuit ignored the fact that the petitioner had fully disclosed each of his residences in Germany to the American Consulate (J.A.30). The Third Circuit's erroneous logic led it to the false conclusion that residency in Germany shortly before the Allied occupation "tended" to show that petitioner was not a victim of Nazi persecution, which in turn converted the concededly immaterial date and place of birth into "material" facts under its "probability" test.

The Third Circuit should never have engaged in such a tour de force since the District Court's finding of fact that the government's own proofs show that no investigation would have been conducted was not "clearly erroneous" based on the record. See also Point III, *infra*, at pp. 33-37. Even to the extent that the alternative approach to materiality is deemed a mixed question of fact and law, whether an investigation would have been conducted is a

factual component which is the sole prerogative of the District Court. *Pullman-Standard v. Swint*, 465 U.S. 273, 286-287 n.16 (1982).

Furthermore, the District Court's finding of fact that Seymour Finger was in error in testifying that the regulations required that the applicant for a non-preference quota immigration visa had to be a victim of Nazi persecution (Pet.App.C, 119a-120a n.7) was not "clearly erroneous" and should not have been ignored by the Third Circuit. Instead, the Third Circuit ignored that finding and ignored the actual regulation in the record (Pet.App.E, 140a-142a) in reaching its own *de novo* (and clearly erroneous) finding that the absence of being a victim of Nazi persecution was an ultimate disqualifying fact making the concealed date and place of birth "material" under the second prong of *Chaunt*.

Even with the attempts to read into the denaturalization statute a legal interpretation of "material" as merely "capable of influencing" and a diluted evidentiary standard of mere "probability" or "possibility", the District Court's findings that petitioner's concealments would have had no effect whatsoever and that no investigation would have been conducted, should be dispositive for petitioner.

III. THE REQUIREMENT OF SECTION 1451(a) THAT THERE CAN BE NO DENATURALIZATION FOR A MISREPRESENTATION OR CONCEALMENT OF A "MATERIAL FACT" UNLESS NATURALIZATION WAS "PROCURED BY" SUCH FACT INDICATES THE GOVERNMENT MUST PROVE THAT A DISQUALIFYING FACT ACTUALLY EXISTED

The use of the words "procured by" in the Section 1451(a) requirement that, before there can be a denatural-

ization, naturalization must have been "procured by concealment of a material fact or by willful misrepresentation" indicates that Congress intended that the Government must establish the actual existence of a disqualifying circumstance in order for a misrepresentation of fact to be material. See concurring opinion of Justice Blackmun in *Fedorenko,* 449 U.S. at 518-526; and dissenting opinion therein of Justice Stevens, 449 U.S. at 530-538. The use of the grammatical past tense in the phrase "procured by" should preclude the Government's statutory interpretations that a citizen can be denaturalized if the misrepresented fact merely "might have been" or could "possibly have" been, or "might have been useful" in, or "capable of influencing" the procurement of citizenship. The phrase "procured by" gives context to and limits the scope of the substantive "material fact" requirement. It is unambiguous in requiring that naturalized citizenship must have been "procured by" the immigrant having concealed or misrepresented a "material fact."

Conversely, if the true fact had been disclosed, or accurately represented, then that disclosure had to have been of the kind of fact that would have resulted in making the immigrant ineligible for citizenship. Thus, the Government's argument that denaturalization is authorized for misrepresentations "even though truthful answers regarding the misrepresented facts would not necessarily have required that result but simply might have required it", (Brief for the United States, p.20), is contradicted by the plain meaning of the words "procured by" in Section 1451 (a). "Material fact" is not an isolated phrase or abstract thought capable of independent interpretation. Materiality is a criterion for categorizing facts in relation to the legal

elements of the denaturalization statute. Here, "material fact" must be read in the context of a fact that was suppressed and as a direct result citizenship, for which the immigrant was not otherwise eligible, was "procured by" suppressing or misrepresenting such fact. Thus, a "material fact" has to be a fact which is controlling or outcome determinative, not merely a fact that might be relevant or possibly of interest. As this Court observed in *Anderson v. Liberty Lobby, Inc.*,

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." 475 U.S. — at —, 91 L.Ed 2d 202, (1986).

When the District Court found that had petitioner "given the correct information in his visa application form, his visa nevertheless would have been issued" (Pet.App.C, 119a), it clearly meant that petitioner's citizenship could not have been "procured by" any of his misrepresentations or concealments. Had the petitioner made truthful disclosures of that which was misrepresented or concealed, it would not "have had any effect whatsoever", as the District Court found (Ibid). Indeed, the Third Circuit agreed with the District Court that none of the facts that "were suppressed, if known, would have warranted denial of citizenship" (Pet.App.A, 20a). Thus, the words "procured by" would have to be read out of the statute, or given an unnatural and ungrammatical meaning, before the Government's proposed "possibility" and "might have" tests for materiality could prevail. The "procured by" statutory language also undermines the alternative approach of

Chaunt if Justice Douglas' *dicta* were to be construed literally; whereas proof of the actual existence of an ultimate disqualifying fact is consistent with the "procured by" statutory requirement; the actual holding in *Chaunt;* the actual holding in *Fedorenko;* and the clear unequivocal, and convincing evidentiary standard in *Schneiderman.*

The Government would have this Court borrow case law which has interpreted the meaning of materiality in federal criminal statutes (18 U.S.C.1621,18 U.S.C.1623 and 18 U.S.C.1001), irrespective of their different purpose and despite the denaturalization statute's specific requirement that naturalization had to have been "procured by" the misrepresentation of a material fact (Brief of United States, pp.25-28). Those same arguments were made in the Government's Brief in *Fedorenko* and were not persuasive in view of the specific language of the Displaced Persons Act ("DPA"), which required that the misrepresentation be "for the purpose of gaining admission into the United States as an eligible displaced person". 62 Stat. 1013. *See Fedorenko,* 449 U.S. at 507. That additional purpose or intent language of the DPA is similar to the additional "procured by" language of the denaturalization statute and the additional "for purposes of obtaining any benefit" language of the pre-naturalization statute. Thus, each of those immigration statutes has an additional legal element which makes them dissimilar to the federal criminal perjury and false swearing statutes, although all of the statutes require proof of some form of materiality.[4]

---

[4] It is anomalous that any criminal prosecution for false swearing would afford the defendant the greater procedural and constitutional safeguards of trial by jury, after an indictment by

(Continued on following page)

The Government argues that, "The materiality standard under those [criminal] statutes does not require a showing that disclosure of the true facts would necessarily have led to a different result" (Brief for U.S., p.25), and cites mainly to pre-*Fedorenko* cases for the proposition that a false statement is "material" if it is merely "capable of influencing" a court, grand jury or government agency. Part (c) of 18 U.S.C. § 1623, entitled *False declarations before grand jury or court,* expressly requires "proof that the defendant while under oath made irreconcilable contradictory declarations *material to the point in question* . . .", and part (d) bars prosecution if the declarant makes an admission before the false declaration has "not *substantially affected the proceeding* . . ." (emphasis added). 18 U.S.C. § 1621, entitled *Perjury generally,* covers "any *material* matter which he does not believe to be true"; and 18 U.S.C. § 1001, entitled *Statements or entries generally,* is aimed at a government claimant who "willfully falsifies, conceals or covers up by any trick, scheme, or device a *material* fact". Each provides for fine and imprisonment and none refers or relates to denaturalization.

None of those false swearing statutes requires that a respondent, at his peril, make a perfect score and be completely accurate in responding to every inquiry a governmental representative chooses to make. Instead, each of the false swearing statutes requires proof of some form of

---

(Continued from previous page)

a grand jury, where the defendant has the protection of the right against self-incrimination and has the presumption of innocence; whereas the naturalized citizen is subject to the "extraordinarily severe penalty" of denaturalization without any of those safeguards to liberty. *Klapprott v. United States,* 335 U.S. 601, 612 (1949).

materiality consistent with the object or purpose of the statute.

Moreover, neither 8 U.S.C. § 1427(a) nor the definition of lack of good moral character in § 1101(f)(6) make false swearing a *per se* disqualification. The Government's argument that "Read literally, these provisions suggest that even a single piece of false testimony can disqualify a person from citizenship because of a lack of good moral character" requires the reader to ignore the critical purpose language that the false testimony be given "for the purpose of obtaining any benefits under this chapter [immigration laws]." (Brief of United States, p.45).

Since the effect of denaturalization is so drastic to the naturalized citizen and so much more "an extraordinarily severe penalty" than a fine or imprisonment, the requirement of materiality for denaturalization should not be diluted by borrowing from case law lessening the governmental burden under the inapplicable false swearing statutes. *Klapprott v. United States,* 335 U.S. 601, 612 (1948). The use of the words "procured by" should indicate that for a fact to be "material" it must be a fact which actually influenced an immigration official, such that but for the misrepresentation or suppression, naturalization would not have been "procured".

In any event, even if this Court were to adopt the Government's diluted test that a misrepresented or concealed fact becomes "material" merely by being "capable of influencing" an immigration official's decision, petitioner could not be denaturalized in view of the District Court's findings. As demonstrated *supra,* the District Court's findings, that the truthful disclosure that petitioner had been born on September 21, 1915 in Reistru would not

"have had any effect whatsoever" (Pet.App.C, 119a), precludes such facts from being "capable of influencing" an immigration official to deny a visa or naturalization.

The District Court further found that even former Vice Consul Seymour Finger (who gave false testimony as to a non-existent Nazi persecution visa regulation requirement) "would not have denied a visa even to a manager of a 15 employee brush and broom factory" (Pet.App.C, 119a). That finding precludes petitioner's alleged omission on his Alien Registration Form of one of his past "activities" as a clerk-bookkeeper in a brush and broom shop from being "material". A vice consul could not have been so influenced by its omission that he could have properly denied a visa on a ground of exclusion under the law. *United States ex rel. Teper v. Miller*, 87 F.Supp. 285 (S.D.N.Y. 1949). Indeed, in this case Frank K. Schilling, the vice consul who actually processed petitioner's file had a translation of petitioner's Lithuanian identification card which listed his occupation in Lithuania as "Occupation Office-Worker" (J.A.28). That available and disclosed information obviously did not so influence Frank K. Schilling that he denied a visa to petitioner. Indeed, the visa application itself required only a statement of what the immigrant's present "calling or occupation is", to which petitioner correctly answered "dental technician" (J.A.30).

The Government argues that the absence from the Visa Application of petitioner's alleged residence in Kedainiai in the summer of 1941 constituted concealment of a fact "capable of influencing" a Vice Consul not to grant a visa. The District Court, however, found that even if Seymour Finger had been the vice consul who processed petitioner's application, "the fact of residence in Kedainiai

during 1940-1942 would not have raised any questions in his mind" (Pet.App.C, 136a). Moreover, Section 7(b) of the Immigration Act of 1924 required disclosing residences only for 5 years preceeding the visa application or here back to January 1942, which meant that there was no statutory requirement that petitioner had to have listed his residence in Kedainiai in the summer of 1941. If a non-disclosed fact was not statutorily required and would not have raised any question, how could it be "capable of influencing" a proper immigration decision?[5]

Petitioner disclosed his wife's birthplace as Kedainiai (J.A.30) and, as the District Court found, she listed her birthplace and residence in Kedainiai (Pet.App.C, 119a) in their jointly processed visa applications. Moreover, Government witness Kostas Januska, also a former member of the Siauliai, listed his residence in Kedainiai on his visa application (X189-192, X1105-1165) and was granted a visa without triggering off any investigation. Indeed, Seymour Finger testified that he did not even know where Kedainiai was, although he saw it listed on petitioner's visa application (J.A.208). The significance of the former Vice Consul's observation of the name of the town of Kedainiai on the visa application is that it shows it was, at a minimum, mentioned in the communications between petitioner and the German speaking personnel at the American Consulate who actually filled out petitioner's Visa Application and Alien Registration Forms. Former CIC Officer Hartman's testimony established that there were a great deal of discrepancies between entries on visa forms and what the ap-

---

[5] The Foreign Service regulations required that "An immigration visa may be refused only on a ground provided in the law and regulations". 22 C.F.R. § 61.346(c).

plicant actually said to the Consulate: "Generally, the applicant was simply asked whether the data on the visa application was correct, but he had no way of knowing. The documents were in English" (X1727-1730, X1735-1741).

The District Court found that the petitioner did not change his identity as he "continued to use his own name" and that none of his alleged concealments of facts served to "insulate" him "from charges of war crimes" (Pet.App.C, 118a-119a). Even the Third Circuit, after its review of the District Court's findings, agreed that "because there is no hard evidence in the record that the consulate officials in Stuttgart had knowledge of these particular atrocities at the time defendant applied for his visa, and the government did not prove that knowledge of the defendant's residence would have prompted an investigation, we cannot conclude that this concealment alone was material under the second prong of *Chaunt*" (Pet.App.A, 35a). The District Court was even stronger in its ultimate finding that, "This is far from proof by clear, unequivocal and convincing evidence that an investigation would have occurred if defendant had given truthful responses to all four of the matters as to which his answers were false" (Pet.App.C, 136a).

Under Rule 52(a) of the Federal Rules of Civil Procedure, the District Court's finding that disclosure of none of the suppressed or misrepresented facts would have resulted in an investigation should not have been set aside, or, as here, ignored by the Third Circuit, unless it was clearly erroneous. In view of *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. —, 106 S.Ct. 1527 (1986), the Third Circuit erred in making its own *de novo* finding that discrepancies in post-war Allied-occupation, German municipal residency records as to petitioner's date and place of

birth would have resulted in an investigation. (Pet.App.A, 32a-33a). In making that finding the Third Circuit (1) had to ignore the District Court's finding that disclosure of the truth would not have resulted in an investigation; (2) had to make an unsupportable inference that there is any logical connection between disclosure of true date and place of birth and prior residences in Germany; (3) ignore the fact that petitioner fully disclosed each of his residences in Germany in the Visa application without triggering off an adverse investigation; and (4) ignore the reference on the Visa Application by Vice Cousul Schilling that "Police Dossier available" which presumptively meant that he had checked with the police in all of the residences listed by petitioner and had not found any adverse information "capable of influencing" his decision on whether to grant a visa to petitioner.

Contrary to this Court's directive in *Schneiderman* that, "So uncertain a chain of proof does not add up to the requisite clear, unequivocal and convincing evidence for setting aside a naturalization decree", 320 U.S. at 159, the Third Circuit made an improper leap of logic from a misrepresented date and place of birth to its *de novo* finding of an investigation into German residences and from that inference continued on to the tenuous, and ultimately irrelevant, conclusion that petitioner was not a victim of Nazi persecution. If that tour de force, which is the basis for the Third Circuit's reversal of the District Court, is left unreversed, then ". . . valuable rights would rest upon a slender reed, and the security status of our naturalized citizens might depend in considerable degree upon the political temper of majority thought and the stresses of the times". 320 U.S. at 159.

There can be no doubt that the flawed review of the record, the strained and illogical reasoning, and the improper *de novo* findings of the Third Circuit just two months after the opinion of this court in *Icicle Seafoods, Inc., supra*, could have resulted only from the "hydraulic pressure" created by the belated Soviet accusations that petitioner committed atrocities in 1941.

Although the Government would now have this Court establish a standard of materiality that would permit speculation as to what an investigation conducted then "might" have "possibly" disclosed, the Government admitted during discovery that there existed no information whatsoever about petitioner in the records of the Federal Bureau of Investigation, the Central Intelligence Agency, the State Department Office of Security, the Berlin Document Center, the Federal Republic of Germany, the Weisenthal files, the International Refugee Organization, and the subcommittee of Immigration, Citizenship and International Law of the Judiciary Committee that would then have prompted an investigation. [Answers to Interrogatories No. 39, 41-45, and 48 (X1314-1315)]. Irrespective of date and place of birth, no Juozas Kungys was identified as a person about whom there was adverse information.

There is no contemporaneous Soviet report or document in the record referring to petitioner as either the leader or participant in the atrocities.[6] Indeed, two of the

---

[6] The American consular officers did not have access to Soviet sources of investigation (NKVD). As stated in the 1948 Senate Judiciary Report on Displaced Persons in Europe, "Access to official records or witnesses in the Russian Zone is precluded". (p.27). As former vice consul Finger testified the sources of investigation were the consular files, the German police and the refugee camps. (J.A.198-199).

Soviet witnesses testified that they had read Communist newspaper articles about the atrocities in Kedainiai after the War and they made no reference to petitioner, but instead had stated that one Kubiliunas was shot for being the leader who committed those atrocities. (Dailide, X1014-15 and Devidonis, X721, see also X234).

No UNRRA screening committee, on which there were Soviet representatives, ever accused petitioner of being a Nazi collaborator. (See J.A.69). After the Allied occupation, German civil authorities attested to the good conduct of petitioner (J.A.37), and not even the Soviets had made any accusation against petitioner at the time of his application for visa in January 1947 or citizenship in February 1954. (X19-20).

In response to petitioner's requests to admit, the Government (which then knew petitioner's correct date and place of birth and all of his residences and occupations) conceded that there were no records that petitioner was ever a member of the Nazi party, the German military, any police organization, or that he ever was convicted of a crime anywhere. (X19-20, X1309-10, Admission and amended Admissions, 3, 4, 18, 19, 21, 26, 45, and concessions at oral argument on January 24, 1983 before Magistrate Peretti, Docket Entry No.115).

At the trial, the Government did not produce a single witness in the Free World who had first-person actual knowledge that petitioner committed any atrocity. The Government introduced voluminous German records which depicted the Nazi persecutions and murders throughout Lithuania (G Series, X212-474). The Government admitted that none of the German records contains petitioner's

name or indicates that the petitioner had in any way participated in any of the persecutions or killings. (Admission No. 26, A573). In its opinion, the District Court expressly found that although: "[the German records] constitute evidence that [the Nazis] used local people in the course of their work, they do not refer to the use of local people at the killings in Kedainai nor do they implicate the defendant in this case in any way". (Brackets added) (Pet.App.C, 52a).

The Third Circuit by-passed, and thus did not disturb, the District Court's finding that the Soviet depositions were unreliable and inadmissable. No reasonable appellate court could have found that the District Court's findings were "clearly erroneous" within the meaning of Rule 52(a). In accordance with the teaching of *Icicle Seafoods, Inc.*, the District Court's findings were "unassailable" and the District Court applied the proper rules of evidence and constitutional law as set forth in prior opinions of this Court and the Third Circuit itself. 475 U.S. at —, 106 S.Ct. at 1527.

The Third Circuit had previously been clear as to the standard of review as to ultimate facts, stating, "It is the responsibility of an appellate court to accept the ultimate factual determination of the fact finder unless that determination either (1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supporting evidentiary data". *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (C.A. 3, 1972).

The District Court undertook a detailed analysis of the reasons for its ultimate findings as to the Soviet depo-

sitions[7] and found, *inter alia,* (a) "many aspects of the deposition procedures cast doubt upon the reliability of the testimony concerning defendant" (Pet.App.C, 95a) including: (1) warm up questioning by the Soviet Procurator to lock in the witnesses' testimony (Pet.App.C, 92a-98a); (2) limitations imposed by Soviet Procurators on the scope of petitioner's cross-examination of the Soviet witnesses (Pet.App.C, 92a-101a); (3) interference with petitioner's cross-examination of the Soviet witnesses by the Soviet procurator (Pet.App.C, 99a-100a); (4) strategic omissions and mistranslations of the testimony of the Soviet witnesses by the Soviet interpreters (Pet.App.C, 101a); (5) the pervasive use of blatantly leading questions by the Government, "improperly affecting" the entire proceeding (Pet.App.C, 98a); and (6) interference by the Government in the cross-examination of the Soviet witnesses (Pet.App.C, 100a); and (b) "that these depositions, insofar as they purport to inculpate defendant, are unreliable" (Pet.App.C, 86a), noting (a) material inconsistencies between the deposition testimony and the deponents' "protocols" (Pet.App.C, 104a-105); (b) the failure of any witness to identify unequivocally the wartime photo-

---

[7] The Soviet depositions were taken *de bene esse* pursuant to an order dated October 14, 1981 (A50-52). That order provided that the depositions would "be governed by the Federal Rules of Civil Procedure and plaintiff shall not interfere directly or indirectly with the right of defense counsel to conduct a full and free cross-examination of each witness" (A52), and that "no witness shall be instructed by plaintiff not to answer any questions". (A52). That order also provided that the Government "shall have present at each day of each deposition in Europe translators proficient in Lithuanian and Russian who are disinterested in the outcome of the lawsuit . . ." (A52; Pet.App.C., 95a). At the depositions the Government disregarded such fundamental procedural safeguards.

graph of petitioner (Pet.App.C, 80a,83a,86a); (c) the absence of earlier "protocols" and transcripts of earlier testimony by the deponents about the Kedainiai killings (Pet.App.C, 105a-108a); (d) the potential for undue influence by Soviet authorities over the deponents (Pet. App.C, 97a-105a); and (e) material inconsistencies in the testimony of the Soviet witnesses.

Following that lengthy analysis of its holding, the District Court finally concluded,

> "The Lithuanian depositions will be admitted for the limited purpose of establishing the happening of the killings in Kedainiai in July and August 1941. They will not be admitted as evidence that defendant participated in the killings". (Pet.App.C, 108a).

A trial court's discretionary determinations as to the admissibility of evidence are significant on appeal only if "manifestly erroneous". *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284 (C.A. 3, 1979), *cert. denied*, 444 U.S. 917, *reh. denied* 444 U.S. 985 (1980); *Atlantic Mutual Ins. Co. v. Lavino Shipping Co.*, 441 F.2d 473 (C.A. 3, 1971); *United States v. Lopez*, 543 F.2d 1156 (C.A. 5, 1976), *cert. denied*, 429 U.S. 1111 (1977).

Moreover, with respect to a non-jury trial, error can only be predicated upon a gross abuse of discretion with respect to the admissibility of evidence provided the Court considers that which is offered. The trial court, sitting as both judge and trier of the facts, is presumed to disregard the inadmissible and rely upon competent evidence. *Plummer v. Western Intern. Hotels, Co., Inc.*, 656 F.2d 502 (C.A. 9, 1981); *Multi-Medical Convalescent and Nursing Center of Towson v. N.L.R.B.*, 550 F.2d 974 (C.A. 4, 1977); *United States v. Nicholson*, 492 F.2d 124 (C.A. 5, 1974); *Caldwell v. Craighead*, 432 F.2d 213 (C.A. 6, 1970), *cert.*

denied, 402 U.S. 953 (1971); *Teate v. United States,* 297 F.2d 120 (C.A. 5, 1961).

The District Court's determination to accord only limited use to the Soviet depositions is well within its discretion and consistent with the decisions of several other American courts in denaturalization cases brought by the Government with the assistance of the KGB. Rule 105, Fed.R.Evid.; and *see, e.g., United States v. Linnas,* 527 F.Supp. 427 (E.D.N.Y. 1981), *aff'd* 685 F.2d 427 (C.A. 2, 1982); *United States v. Osidach,* 513 F. Supp. 51 (E.D. Pa. 1981), *appeal dismissed,* No. 81-1956 (C.A. 3, July 22, 1981); *United States v. Kowalchuk,* 571 F.Supp. 72, 79-80 (E.D.Pa. 1983), *aff'd,* 773 F.2d 488 (1985), *cert. den.,* 1065 S.Ct.1188 (1986). *Maikovskis v. I.N.S.,* [Immigration Court June 30, 1983], 773 F.2d 435 (C.A. 2, 1985), *cert. denied,* 106 S.Ct. 2915 (1986).

In *United States v. Kowalchuk, supra,* the District Court stated,

> "The testimony of the Soviet witnesses must be viewed with even greater skepticism . . . Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as 'clear and convincing' proof of charges as serious as those leveled against this defendant". (571 F.Supp. at 79-80).

In its brief to the Court of Appeals in the *Kowalchuk* appeal, the Government stated,

> "The District Court specifically stated that it did not rely on any of the Soviet witness testimony concerning the acts of defendant himself . . . Although the government believes that the depositions should have been credited in their entirety, the *District Court*

was not in error in crediting them only to a limited extent. (Government Brief, p.37) (Emphasis added).

In view of the absence of any Free World testimony, the demonstrated unreliability of the Soviet evidence, and the unsupportable claims of Seymour Finger, this hydraulic pressure case should never even have been prosecuted; let alone should a judgment of an appellate court be left standing when based on an improper appellate *de novo* finding predicated on false testimony by a government witness as to a non-existent visa regulation requirement.

———o———

CONCLUSION

The Judgment of the Third Circuit should be reversed and the Judgment of the District Court should be reinstated, without any further remand, since even pursuing legal theories based upon speculation and suspicion can not convert the innocuous, if not trivial, misstatements of petitioner into material facts, by which petitioner "procured" his citizenship.

Respectfully submitted,

DONALD J. WILLIAMSON
Counsel of Record
WILLIAMSON & REHILL
Attorneys for Petitioner

August, 1987

On the Brief

DONALD J. WILLIAMSON
MICHAEL F. REHILL